The Fictional Protagonist of Modern Liability Law: A History of the Origins of the Reasonable Man

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ABSTRACT
This thesis explores the origins of the reasonable man, an important concept in Anglo-saxon liability law, by zooming in on its conception in the mid-19th century and its preconceptions in antiquity. As this has not been done before, the goal of this thesis is to explain and analyze these origins in order to enlarge our understanding of this important development, and hitherto terra incognita, in modern legal history. Within this study, the term 'reasonable man' is traced back in time through a study of both primary and secondary sources, including case-law, works of (legal) philosophy and correspondences.

Keywords
Reasonable man, jurisprudence, Roman law, legal history, English law.

INTRODUCTION

Leonardo da Vinci's famous drawing, the Vitruvian Man, is often seen as a portrayal of the essential symmetry of the human body. Additionally, by displaying the ideal human proportions as described by the Roman architect Vitruvius, da Vinci's drawing can be viewed as indicative of the human habit to measure the world through reference to itself. This tradition is manifested in various units of measurement such as the ell and the feet. In addition, there is a most peculiar anthropometric unit of measurement in which one's behavior is measured in reference to the behavior of an average person: an ideal-type. This legal unit of measurement is the reasonable person or reasonable man. The reasonable person, a less gendered ideal-type than the Victorian reasonable man, is a standard in common law systems which is employed to determine whether one person has acted negligently vis-à-vis another. Regardless, it has to be understood that the common law is not unique in this characteristic as offsprings of this reasonable person can be found in e.g. European law and he has more than a few continental siblings in civil law systems. Nonetheless, it is within the common law of liability, that the reasonable person occupies a most prominent and important position. Menand went as far as asserting that "the reasonable man is the fictional protagonist of modern liability theory" [1].

In the midst of this praise, it is surprising that little research has been done into the origins of this figure. As its historical roots have not been analyzed or explained in any comprehensive manner, it is the goal of this research-thesis to do so.

The merit of studying the reasonable man from this perspective is that it transcends mere positive law and allows for a holistic explanation that accounts for the nexus of jurisprudence, intellectual history and public philosophy at which the concept lies. As Peter Watson puts it with great eloquence, the reasonable man "is one of the main points where the law treats the question: how are we to live together" [2].

I. A 19TH CENTURY PATERNITY TEST: THE BIRTH OF THE REASONABLE MAN

Watson, in his encyclopedic work *Ideas,* wrongly asserts that Oliver Wendell Holmes Jr.'s most important contribution to civil law is his invention of the reasonable man. In a way, this is justifiable for when writing a history of thought, covering a time-span 'from Fire to Freud', and basing it largely on secondary literature, one is bound to err a few times when it comes to the details. In this particular case, Watson based his false statement on Menand's *The Metaphysical Club*. However, later in this book, Menand reveals an important nuance which was apparently missed by Watson in his reading and thus explains the mistake:

> Holmes didn't coin it [i.e. the term 'reasonable man'] - it began appearing in American and English opinions around 1850 - but, along with his English friend Frederick Pollock, he probably did as much as anyone to define and establish it [3].

Regardless of the added nuance, Menand's statement is rather vague on the exact origins and therefore still leaves open the question of the reasonable man's precise ancestry. Hence it is the goal of this section to unravel the concept's 19th century genealogy.

1. American Attorney

In 1880, Oliver Wendell Holmes Jr., then working as a Bostonian lawyer, was recommended as a speaker by A. Lawrence Lowell, the future president of Harvard University, for a number of lectures at Harvard Law School. Holmes gladly accepted and, without notes, delivered twelve lectures about the evolution of legal doctrine to packed lecture halls. A year later, he published a compilation of these Lowell lectures in the form of a book: *The Common Law.*

In his lecture 'trespass and negligence', Holmes comments on the then relatively novel development of assessing negligence on the basis of what a man of ordinary prudence would have done [4]. In reference to this observed development, he cites an old English case, *Vaughan v Menlove*, which featured such a man of ordinary prudence. Editions may vary, but any diligent reader of the 1968 edition, of which the footnotes are based on the written marginalia in Holmes' own copy, would never conclude that Holmes invented the reasonable man. The reason is that, in a footnote to the relevant chapter, Holmes mentions a landmark English

case, *Blyth v Birmingham Waterworks Company*, in which the figure of the reasonable man saw the light of life in English law. This does not only show that Holmes was well aware of the legal developments in Britain at the time but also that the reasonable man was not the product of his own mind.

Going back to Watson's statement, insofar as American case-law is concerned, *Brown v Kendall* [5] was one of the earliest appearances of the standard of a 'prudent and cautious man' in American law and for many scholars this case marks the watershed moment where the American law of negligence is born [6]. Although it dates from 1850 and fits the development described by Holmes, it has been decided without reference to *Vaughan,* which predated it and the case is overall both legally and linguistically very different from both *Vaughan* and *Blyth*. Hence, any relationship whatsoever between *Brown* in Massachusetts and *Vaughan* and *Blyth* in Britain seems very unlikely and therefore *Brown* will not be discussed any further.

2. British Barrister

It has been asserted that "along with his English friend Frederick Pollock, he probably did as much as anyone to define and establish it". So how about this English friend? Sir Frederick Pollock was the British jurist and barrister with whom Holmes corresponded extensively. Fortunately, most of their correspondence has been preserved and it appears from Pollock's letter of February 10, 1880, that he and Holmes are very much in agreement on an objective standard of conduct for the law of negligence, based on an ideal-type [7]. Although Holmes and Pollock heavily discussed what they dubbed 'the external standard', it is too much of a stretch to assert they did any defining or establishing. Of course Pollock wrote plenty by himself as well and in his seminal work, *The Law of Torts*, he wrote the following about the standard of care one has vis-à-vis another:

> ... we may say that, generally speaking, the standard of duty is fixed by reference to what we should expect in the like case from a man of ordinary sense, knowledge and prudence [8].

That may be so, but one must keep in mind that Pollock is merely describing the state of the law here and thus adds little more than a synthesis. Although Pollock engaged in such descriptions of the reasonable man more often, he cannot be held to have defined or established it. As neither Holmes nor Pollock defined or established the reasonable man, one must dig deeper by looking into the *Blyth* and *Vaughan* cases, since these were cited by both Holmes and Pollock in reference to the origins of the reasonable man.

3. English Judge

Vaughan was in fact the first case in which the standard of 'a prudent man', a clear predecessor to the later nomenclature, was applied to a case of negligence. The facts aside, the speech by the chief justice is the most instructive when it comes to the rationale behind this reasonable man *avant le mot*. Tindal, C.J. stated that the assertion that the question ought to have been whether the defendant had acted honestly and bona fide to the best of his own judgment, as was stated by the defendant's council, "would leave so vague a line as to afford no rule at all". He concluded that:

> Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual ... we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe [9].

The creation of this 'man of ordinary prudence' is significant for more than just the fact that it foretold and preceded the ascent of the reasonable man. Firstly, it is relevant because the court created an open norm by which negligence, an emerging field of law of which the basics yet had to be established, could be determined. Secondly, by using an open norm, the standard could withstand the test of time, for what is considered ordinary prudence is highly dependent on dominant social mores, which are far from static. What is more, although strictly speaking the reasonable man restricts man's conduct, the standard seems rooted in a firm belief in the perfectibility of man, for it presumes that man is capable of acting like a man of ordinary prudence and that not living up to this capability can be blameworthy.

After the ruling in *Vaughan* it took nearly twenty more years until the term 'reasonable man' was coined. In 1856, the ideal-type was finally consolidated in the case of *Blyth* [10]. Kennedy for the respondent, invoked *Vaughan* in his speech, upon which Baron Alderson, who would later write the majority opinion, interrupted the barrister and asked: "is it an accident which any man could have foreseen?"[11]. In his ruling, Alderson provided the classic definition of negligence in English law:

> Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do [12].

Although chance remains that Alderson conceived the concept out of thin air, this seems rather unlikely because there is a remarkable similarity, also pointed out by Zwalve [13], between the definition in *Blyth* and the following excerpt from D. 9, 2 (*Ad legem Aquiliam*), 31 (*Paulus libro decimo ad Sabinum*): *"culpam autem esse, quod cum a diligente provideri poterit, non esset provisum aut tum denuntiatum esset, cum periculum evitari non possit"*. This freely translates to English as: "negligence is to not foresee what a diligent man would have foreseen or has been warned when the danger could not be avoided anymore". Of course it is not certain whether Alderson alluded to this for he might as well have had the *personne raisonnable* from the French Code Civil in mind or both.

One development pointing in the direction of D. 9, 2, 31 as an explanation for the apparent but implicit intertextuality is the revival of Roman law in the mid-19th century. In Germany, it was popularized by Pandectists (who took their name from the Greek term for the Digests) such as von Savigny, whose ideas were also received enthusiastically elsewhere in Europe [14]. In England, Sir Henry Maine published an essay in 1856, the very same year in which *Blyth* was decided, pleading in favor of an increased knowledge of Roman Law [15].

Although we may never be exactly certain, when

taking into account the magnitude of the foreign parallels, it is safe to conclude that Baron Alderson found inspiration for the coinage of the term 'reasonable man' and his definition of negligence outside of England's borders. Although both the French and Roman option are feasible, it is most likely that he transposed the definition of Roman *culpa* (negligence) from D. 9, 2, 31 to 19th century English law because of the revived interest in Roman law.

Sub-Conclusion

Although the outlines of this development are clearest after *Blyth,* what a reasonable man would do in any given circumstances was and is still very much decided by referring to an average man in society, 'the man in the street' or 'the man on the clapham omnibus' [16]. By being understood in reference to an average man in society, the reasonable man is rooted in the spirits of positivism, the idea that information derived from sensory experience is the exclusive source of knowledge, and realism, which claims to describe and reproduce life as it actually is [17]. Moreover, the concept is indicative of the widespread belief in human reason and man as a measurement of society, which is rooted in the hegemonic position of classical liberalism in 19th century England and the rise of secular humanism paralleling it. What is more, the word 'reasonable' in reasonable man does and did not denote "the reason of syllogisms, ... metaphysics and aprioristic logic" but "a reason focused on empirical reality, on 'facts,' on 'common sense,' and on probabilistic thinking" [18]. In this sense, with the inception of the reasonable man, the heritage of the empiricism of the British Enlightenment revealed itself. In any case, as its traits are so in line with these modern socio-cultural norms and intellectual currents, it can be said that the reasonable man is the embodiment of modernity.

II. ANTECEDENTS IN ANTIQUITY: CONCEPTIONS OF THE REASONABLE MAN *AVANT LA LETTRE*

In the previous section, the similarity between D. 9, 2 (*Ad legem Aquiliam*), 31 (*Paulus libro decimo ad Sabinum*) and Baron Alderson's judgement in *Blyth* has been highlighted. As this definition of *culpa* can be seen as a conception of the reasonable man *avant la lettre*, the goal of the section at hand is to further explore it.

1. Roman Emperor

As the Western Roman empire ceased to exist in 476 AD, the Byzantine emperor Justinian I (527-565 AD), hereinafter referred to as 'Justinian', tried to restore it to its former glory. An undisputed part of this former glory was the Roman law and Justinian had it rewritten in a uniform manner in his *corpus iuris civilis*, the entire body of civil law. One part of this corpus, the Digests, consists of an accumulation of the *ius*, the writings of classical Roman jurists [19]. The Digests are also the source from whence the definition of *culpa,* to which Alderson probably ought to have paid lipservice, is taken. If this hypothesis is correct, then the definition of negligence in English law is of Justinianic vintage. Zimmermann notes that D. 9, 2 , 31 is attributed to Paul but that Paul gave credit to Quintus Mucius Scaevola [20]. Scaevola was a Roman lawyer who died in 82 BC and is credited with inventing the distinction between *dolus* (fault) and *culpa* around 100 BC [21]. In a way, the reasonable man, although heavily shaped by distinctly modern intellectual currents, goes back to the very roots of liability law.

2. Greek Philosopher

Kübler links the trichotomy *dolus-culpa-casus* in Roman law to the trichotomy *adikèma-hamartèma-atychia* in the work of Aristotle with *culpa* linked to *hamartèma* [22]. Although there is no scholarly agreement on Kübler's interpretation, even his most vehement opponent, Daube, concludes that "some influence [i.e. of the Greek scheme on the Roman liability troika] is highly probable" [23]. Moreover, in his letter to Holmes on February 10, 1880, Pollock links the reasonable man to ὡς ἀν ὁ φρόνιμος ὁρίσειεν (*an ho phronimos horizeien*) translates as by which the prudent/practically wise (*phronimos*) person would determine it [24]. For these reasons, it is worth further exploring a possible relationship between the concept negligence and the work of Aristotle.

From the verb αμαρτάνειν (*hamartanein*), which translates as 'to miss the mark', two nouns can be formed: αμάρτημα (*hamartèma*) and αμαρτία (*hamartia*). In Aristotle's *Poetics* (1453a7-10), the term *hamartia* is featured. Aristotle argues that in the best tragic plots the protagonist is "the intermediate kind of personage, a man not preeminently virtuous and just, whose misfortune, however, is brought upon him not by vice and depravity but by some fault [hamartia]" (1453a7-10) [25]. The latter is not a defect of character but an event or action by an agent who errs in some way. For the purpose of this thesis, where one is not concerned with the writing of plays and prose but with law, it needs to be stressed there is debate among scholars as to whether *hamartia* is necessarily unavoidable [26]. No conclusive answer to this matter has been given and based on what has been recovered from the Poetics, probably no conclusive answer can be given. Still, it is the answer to this question that the justification of equating *culpa* with *hamartèma* or *hamartia* hinges upon. For if an action can not be avoided, it is a classic case of *force majeure* and the agent's conduct might be negligent but defensible. Since negligence is based on an agent erring and the erring often results from a flaw in character, the meanings of both concepts seem dissimilar as there is no complete overlap. In the end, whatever the similarity between the concepts, in the real-life tragedies of negligence occurring in modern courtrooms, the reasonable person is the mark that the tortfeasor missed: *hamartanein*.

CONCLUSION

When the most famous student of Plato's *Academy* explored the issue of how men are best to live, he laid the foundations for a common law concept dealing with the related question of how we are to live together. Approximately 870 years after Aristotle wrote his seminal works, a Byzantine emperor attempted to restore the Roman empire to its former glory. In the process, Justinian had a collection of fundamental works on Roman law put together by a team of jurists. An important part of this *Corpus Iuris Civilis* were the Digests, an accumulation of the writings of classical Roman jurists. One Digest, D. 9, 2, 31, contains a definition of culpa which appears to be influenced by an important concept in Aristotle's work: *hamartèma.* In 1856, in the heydays of classical liberalism, an English judge established the classic definition of negligence. In

the spirit of a revived interest in Roman law throughout Western Europe, he seems to have borrowed from D. 9, 2, 31 when conceiving the reasonable man. This term displays a grand belief in free will, practical human reason, and the perfectibility of man; a view which was ushered in by the British Enlightenment. Though the Latin from antiquity was translated by Baron Alderson to 19th century legal English, no intersubjectivity of meaning was provided and the meaning of this new concept was yet to be given shape. With God about to be proclaimed dead and Comte's social physics taking off, it is far from surprising that the notion of the reasonable man became both highly secular, as man became the official legal measurement of human conduct, and highly positivistic and realistic, since the standard was not based on a fictional account of man but on the average man. Two learned jurists showed particular interest in this external standard of conduct and although they did not invent, define or establish it, Pollock and Holmes probably popularized the concept through its use in their works. These are the origins of the reasonable man and the context in which he came into this world. Nowadays, the less gendered reasonable person has many offsprings in various fields of law, but he still appears regularly in courtrooms in e.g. the United Kingdom and the United States to establish whether a duty of care has been breached. As such, he can truly be called the fictional protagonist of modern liability law.

ROLE OF THE STUDENT

S.P. van Oort was an undergraduate student working under the supervision of mr. dr. J.M. Milo when researching and writing for this thesis. The student proposed the topic, formulated the research question, carried out the research, formulated the conclusions and wrote the research paper.

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